BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

THERMAL REDUCTION COMPANY, INC., JOHN WALTON, et al., and JEFFREY G. MORRISSETTE pro se, Appellants, v. OLIVINE CORPORATION, and NORTHWEST AIR POLLUTION CONTROL AUTHORITY, Respondents.	PCHB Nos. 87-70 & 71 ORDER GRANTING APPELLANTS' MOTION FOR SUMMARY JUDGMENT

These appeals have a complex procedural history before the Pollution Control Hearings Board, of which this Summary Judgment and Pre-hearing Motions are only the most recent filings. Appellant John Walton, et al. filed a Motion for Summary Judgment and Affidavit in Support on August 17, 1987, and a Brief and Affidavit in Support on September 23, 1987. Appellant Thermal Reduction Comany, Inc., ("Thermal") joined in the Motion and filed a Memorandum in Support on September 22, 1987. Respondent Olivine filed a Pretrial Motion on September 21, 1987, and its Memorandum in Opposition to Summary

Judgment with Declarations and documents on October 2, 1987. Appellants filed Responses to Olivine's Pretrial Motion on October 1 and 2, 1987.

Oral argument was held on October 6, 1987 in Lacey, Washington. Pollution Control Board members present were: Judith A. Bendor (Presiding), Wick Dufford (Chairman), and Lawrence J. Faulk. Present for the parties were attorneys: Robert M. Tull for appellant Thermal, Brent Carson for appellant John Walton, et al., and John Cary for respondent Olivine.

The Board has considered the arguments, the above filings and documents on file specifically cited therein, as well as those documents on file recited during oral argument, e.g. an April 10, 1987 letter from Northwest Air Pollution Authority ("NWAPA") Control Officer Terry L. Nyman to Mr. Corky Smith, Sr., of Olivine Corporation, and an affidavit of Mike Ruby filed on August 19, 1987 with respondent Olivine's Petition for Reconsideration of Stay.

DECISION

I

On the record before us, we conclude, as announced orally to the parties on October 6, 1987, that no genuine issue of material fact exists, and that as a matter of law summary judgment should be granted.

We therefore do not reach findings or conclusions on Olivine's Pretrial Motion (e.g. to Strike Affidavits, to Bar Challenges, to State Legal Issues with Greater Specificity, and to Declare that Best

Available Control Technology ("BACT") is an issue). Such motion is only relevant if the appeals were to proceed to a hearing on the merits.

II

By way of brief chronology, on March 3, 1987 Olivine submitted to NWAPA a "Notice of Construction and Application for Conditional Approval to Operate" an incinerator in Whatcom County, Washington State. By April 10, 1987 letter, NWAPA Control Officer Nyman informed Mr. Smith of Olivine in pertinent part that:

> The information provided with your application was reviewed to determine that all known, available and reasonable methods of air pollution control will be utilized.
>
> After considering my recommendation and the comments provided at a public hearing, on this matter, the Board of Directors of the NWAPA granted approval at their April 8, 1987, meeting to grant a conditional approval. This approval is contingent upon your payment of the required $100.00 plan, examination and inspection fee, $43.50 legal publication cost, and the following conditions:
>
> 1. Experimental burning shall be limited to sixty (60) days. [. . .]
>
> 2. Burning capacity shall be limited to 50 tons per day, averaged over any seven-day period. [. . .]
>
> 3. Experimental burning shall not continue for more than 120 days after the first operating day.
>
> 4. Olivine Corporation shall complete the experimental phase of incinerator operation during this period. Experimental operation will not be allowed in the future. Olivine must complete a BACT analysis before a final approval to operate can be considered. [Emphasis added; remaining conditions omitted].

The letter continues:

> [. . .] A "Certificate of Approval to Operate" will be issued after we determine that the process was installed in accordance with the plans and specifications submitted with the application and can operate in compliance with the Regulations of this Authority and the conditions of approval. [Emphasis added].

III

The State Clean Air Act at RCW 70.94.151 states in pertinent part:

> If on the basis of plans, specifications, or other information required pursuant to this section, the department of ecology or board determines that the proposed construction, installation, or establishment will be in accord with this chapter, and the applicable ordinances, resolutions, rules, and regulations adopted pursuant thereto and will provide all known available and reasonable methods of emission control, it shall issue an order of approval of the construction, installation, and establishment of the air contaminant source or sources, which order may provide such conditions of operation as are reasonably necessary to assure the maintenance of compliance with this chapter and the applicable ordinances, resolutions, rules, and regulations adopted pursuant thereto. [Emphasis added].

"All known available and reasonable methods of emission control" means BACT. WAC 173-403-030(8).

IV

Furthermore, WAC 173-400-110 states in pertinent part:

> Construction shall not commence, on any new source that is required to register per WAC 173-400-100, until a notice of construction has been approved per WAC 173-403-050.

WAC 173-400-100 covers woodwaste incinerators or other incinerators designed for a capacity of 100 pounds per hour or more. Olivine's incinerator, with a burning capacity of 50 tons per day (e.g. 4,167

pounds per hour), clearly is covered by WAC sections. WAC 173-400-100 and 110. Further, WAC 173-403-050 implements RCW 70.94.152, and both require a determination of BACT prior to operation of a new source.

V

We conclude, reaffirming our October 1, 1987 Order Denying Petition to Reconsider Granting Stay, that the Olivine incinerator is a new source of air contaminants under RCW 70.94.152, despite Olivine's having operated the facility for several years under temporary approvals. We now quote from that earlier Order:

> The relevant provisions of RCW 70.94.152 and WAC 173-400-110 have been in existence longer than Olivine's incinerator. A series of temporary approvals cannot be used to bypass the State's new source approval process for a source which has never obtained such approval. [Order at parag. IX]

VI

NWAPA has not officially concluded that the Olivine incinerator will meet Best Available Control Technology standards. To the contrary, as the April 10, 1987 letter states, NWAPA issued an approval to Olivine to experimentally operate for a limited period of time, under an array of conditions. After completion of the experimental operating period, NWAPA will review the resulting operating data and other information to determine if BACT and other requirements had been met. Even Olivine's own expert, Mike Ruby, concedes in his August 1987 affidavit that BACT has not been demonstrated:

> [. . .] I have designed a testing program to determine if the Olivine MSW incinerator . . . meets BACT as it is now designed and, if not, what measures must be taken to bring it up to the BACT standards. [P.4, Parag. 4; Emphasis added].

VII

NWAPA has issued no Order of Approval pursuant to RCW 70.94.151. Such Approval is a mandatory prerequisite prior to the construction or operation of a new source of air pollution. We therefore conclude that under the State Clean Air Act Olivine currently does not have lawful authority to operate the incinerator in Whatcom County.

VIII

Olivine urges, however, that it nonetheless has lawful authority to operate under NWAPA Regulation Section 311

Section 311 states:

> The owner or applicant may request a conditional approval to operate for an experimental installation, construction or establishment and said approval may be issued by the Board or Control Officer if it appears to the Board or Control Officer from all submitted information that the installation construction or establishment, when completed, will satisfy the emission standards adopted by the Board. Conditional approval shall be limited to one year maximum and may be renewed by application to the Board or Control Officer.

As we previously ruled in our Order Granting Stay (parag. VII) the Board can properly address the validity of a regulation as it is applied to the facts of a particular case. See, Weyerhaeuser Company v. DOE, 86 Wn.2d 310, 545 P.2d 5 (1976).

We reaffirm our conclusions in that Order:

> NWAPA's Section 300 makes notice of construction procedures mandatory for all but specifically excluded sources. Olivine's incinerator is not within a category of excluded sources. Under Section 300 an order of approval is to precede construction. No order of approval is to issue unless a determination of BACT has been made. Section 302.1.

As applied in this case, to the extent Section 311 allows Olivine to operate without a prior finding that BACT is provided, that Section

> not only contradicts the state regulation (WAC 173-400-110), but conflicts with the notice of construction scheme set forth elsewhere in NWAPA's own rules. [Order Granting Stay at parag. V]

IX

The Motion for Summary Judgment is granted due to mandatory procedural requirements of State law applicable to these appeals. This Order in no way addresses the merits. Should NWAPA issue an Order of Approval, and thereafter an appeal is filed with this Board, such issue necessarily awaits another day.

Therefore, the Motions for Summary Judgment are GRANTED.

DONE this 19th day of October, 1987.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman

10/19/87

LAWRENCE J. FAULK, Member

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

JACK and LA VONNE DANIELS, Appellants, v. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY; CITY OF YAKIMA; DAVID RODMAN and SALLY STROTHER, Respondents.	PCHB No. 87-76 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of an approval of a sewer extension by the Department of Ecology, came on for hearing before the Board at Yakima, Washington, on July 28, 1987, Wick Dufford, presiding. Board members Lawrence J. Faulk and Judith Bendor have reviewed the record. Respondent Department of Ecology elected a formal hearing pursuant to RCW 43.21B.230.

Appellants were represented by Frank L. Kurtz, Attorney at Law. Respondent Department of Ecology was represented by Peter R. Anderson, Assistant Attorney General. Respondents Rodman and Strother were

represented by Robert J. Reynolds, Attorney at Law. The City of Yakima appeared through John Vanek, Assistant City Attorney.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

The Department of Ecology is an agency of the State of Washington with authority to implement the provisions of the water pollution control laws of the state, including the authority to approve plans for sewage systems prior to their construction.

II

On March 12, 1984, Ecology issued an Order (No. DE 84-186) to the Yakima County Health District. The Order recited that sewer service areas had been established in most of the municipalities of Yakima County and that the failure of on-site septic tank and drainfield systems had become a widespread problem. The Order required the County to cease issuing permits for new on-site waste disposal systems without Ecology's review and approval of such permits.

III

The application of David Rodman, a home builder, to install an on-site sewage disposal system at a new home being built at 7507

Englewood Avenue, Yakima, came before Ecology in the late summer of 1985. Because of the shallowness of soils on the site, a mound system was proposed.

On September 12, 1985, Ecology approved the proposal, subject to conditions, including the following:

> The subject property shall hook up to the sanitary sewer system within one (1) year of the availability of sewer service.
>
> It should be noted that the extension of sewer lines by the City of Yakima may make sewer available within one (1) year. Therefore, the expenditure for a new on-site system will have an estimated useful life of two (2) years.

Ecology regarded this as a short-term approval for the on-site system.

IV

The purchasers of the new home at 7507 Englewood Avenue were Jack and La Vonne Daniels, who were moving to Yakima from Washington, D.C. The property was owned by Sally Strother, who entered into a sales agreement with the Daniels in September of 1985.

At some point the original plans for a permanent septic system were abandoned. A small on-site system, designed only for temporary use, was built with the expectation that the availability of the city's sewer was imminent.

The Yakima Health District approved the "temporary" system with a 1000 gallon septic tank and 120 square feet of drainfield, on February

12, 1986, with the following caveat:

> Be advised that the size of the system has been greatly reduced because the house is to be connected to the City of Yakima sewer in the near future. Use of the system is approved until June 1, 1986 or until city sewer is available.

The Daniels moved into the house in February of 1986 with the "temporary" on-site system in place.

V

During the course of the project for the Daniels' home, differences developed between the purchasers and the seller and the contractor. On this record the cause and details of the dispute were not made clear, but its essence is an issue of how much money should be paid out by the buyer.

At the time of the hearing before this Board, this dispute remained unresolved.

VI

The southern boundary of the Daniels' lot does not directly abut the public sewer easement. On June 24, 1986, Sally Strother took a quit claim deed to a small fragment of property which lies between the Daniels' lot and the public easement. On the basis of a survey, she had concluded that the Daniels' "temporary" drainfield was on this fragment of property.

On June 25, 1986, she wrote to the Daniels' and demanded that the use of the drainfield be discontinued within 30 days. The Daniels'

did not comply with this demand, but continued to live in the house and use the "temporary" system.

VII

On September 29, 1986, the Yakima Health District issued an Order to the Daniels "to proceed immediately with securing an adequate means of sewage disposal or vacating your house."

In the Order, Health Officer Robert G. Atwood, M.D., stated:

> I am now aware that you and your contractor, Dave Rodman, are at impasse about what payment is due him and that he refuses to proceed with sewer construction until agreement is reached. Our staff has delayed enforcement of the temporary permit to allow sufficient time for settlement of the financial issue. The matter is unresolved, and the temporary system is inadequate to serve you further. In fact, some early signs of failure are evident."

VIII

Subsequently, the Daniels had the "temporary" system professionally inspected and were advised that it was not failing. They entered into an arrangement by which the system would be checked periodically and the tank pumped as necessary to assure normal function.

No further enforcement action was taken by the Health District against the Daniels. Instead, on March 5, 1987, the Health District advised that it would make routine inspections of the Daniels' "temporary" on-site system, and asked for copies of all receipts for

pumping the system. The Daniels were requested to provide an idea of when they would be connecting to the sewer, but the District stated:

> This request is not an effort to set a deadline, but the information will help us evaluate if the existing system will function effectively until the sewer connection is accomplished.

IX

In late February 1987, the Health District wrote to the Yakima City Engineering Department urging the completion of a sewer connection to the Daniels' residence. The letter noted that Daniels' on-site system "is being used primarily as a holding tank with routine pumping." The District advised that other lot owners in the area on property platted by David Rodman desired access to a sewer extension as well.

X

Yakima is extending its sewer mains into unincorporated areas around the City, such as that involved here. Developers, like Rodman, build sewer extensions from the mains along dedicated public easements to provide the means for connecting new homes. These extensions must be built in accordance with plans approved by the City and by Ecology. The developers are reimbursed for their costs by the assessment of shares from the homeowners who hook up. The ownership of the sewer extension is transferred to the City which then assumes responsibility for operation, repair and maintenance.

XI

Eventually it became necessary for Rodman to build the sewer extension contemplated for his approved plats in order to provide promised sewer service to a new house on a lot other than Daniels'.

Plans submitted by Rodman to the City were forwarded by the City to Ecology for review on March 18, 1987. On forwarding the plans, the City pointed out that the planned sewer was physically located so it could serve the Daniels' residence. However, the City stated that it was aware of a dispute over access to the proposed sewer line by the Daniels.

The dispute refered to was over obtaining a private easement from the Daniels' property across the fragment owned by Sally Strother to the sewer.

XII

Ecology initially responded to the plan submission with a number of written comments, including the following:

> Of particular concern to us is the wisdom of going ahead with this extension in light of the fact that easements are not in place to serve property for which Mr. Rodman applied for on-site approval and received only short term on-site approval with specific directions for future hook-up [enclosing the letter of September 12, 1985 quoted above in Finding of Fact III]. Sewering is overdue for these sites.

XIII

Finally, on April 16, 1987, Ecology approved the sewer extension

project with, among others, a special condition requiring the filing of a sewer utility easement for a gravity sewer extension to serve the Daniel's property. The condition included the following language:

> Such easement shall in no case preclude hookup after 1 year of completion of sewer construction.

On the same day, a document reciting the terms of a proferred easement from Sally Strother to Jack and La Vonne Daniels for the installation and maintenance of a sewer line on the fragment owned by Strothers was filed at Ecology's offices. The easement was made subject to the limitation that:

> Said easement will not be usable by Grantees or their successors for a period of one year after the acceptance of David Rodman Sewer Main by the City of Yakima, unless otherwise approved by grantor.

The document also prohibited use of the easement until the Daniels' paid the City of Yakima 1/5 of the actual cost of the sewer extension project and it called for the payment to the grantor of a sum in the neighborhood of $1500 prior to any utilization of the easement.

XIV

The Daniels' appealed Ecology's approval of the sewer extension to this Board on April 20, 1987, requesting an order staying the approval.

On April 27, 1987, argument was heard on the stay issue. On the assurances of the parties that construction of the extension would not

damage the Daniels' existing on-site system, the Board denied the Stay.

XV

Thereafter the sewer extension was undertaken and on May 11, 1987, the project was completed. On July 23, 1987, the City of Yakima executed a Declaration of Construction of Water Pollution Control Facilities certifying to Ecology the completion of the project in accordance with the plans and specifications.

XVI

At the time of our hearing, the Daniels' had not accepted the easement from Sally Strother on the terms under which it was offered to them. Ecology's representative testified that the easement document filed with the agency satisfied Ecology's condition of approval. He said Ecology was unconcerned with the price the grantee was seeking in exchange for granting the easement.

XVII

The plumbing in the Daniels' house was installed to accommodate connection by gravity flow to a sewer line to the south. This is the direction in which Sally Strother's fragment of property blocks access to the public sewer, absent a private easement. Though the cheapest and most logical, the southern route is not the only available sewer access for the Daniels. On the north, their property borders a public easement and they could connect up in this direction by installing a pumping system cpable of a 8 to 12 foot lift.

The record does not disclose whether the Daniels have explored with Ecology and the Health District the possibility now of converting to a permanent on-site installation, appropriately sized and using a mound system as initially proposed.

The costs of either a northerly connection to the sewer by pump or a permanent mound system would exceed the costs of connecting to the south with gravity flow to the sewer.

XVIII

No evidence was offered on physical facts relating to the sewer system, its design, function or capacity to handle the projected load. No evidence was provided which showed that the quality of any public waters would be threatened by the construction and operation of the sewer extension at issue in accordance with the plans and specifications submitted.

XIX

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board makes the following

CONCLUSIONS OF LAW

I

The board has jurisdiction over these parties and these matters. Chapters 43.21B RCW and 90.48 RCW.

II

Ecology's role in the approval of sewer extensions is derived from RCW 90.48.110. That section reads:

> All plans and specifications for the construction of new sewerage systems, sewage treatment or disposal plants or systems or for improvements or extensions to existing sewerage systems or sewage treatment or disposal plants, and the proposed method of future operation and maintenance of said facility or facilities, shall be submitted to and be approved by the department, before construction thereof may begin. No approval shall be given until the department is satisfied that said plans and specifications and the methods of operation and maintenance submitted are adequate to protect the quality of the state's waters as provided for in this chapter. (Emphasis added).

III

Appellants have not demonstrated any shortcomings in the engineering or design of the subject sewer extension which would interfere with its effective functioning in carrying away domestic wastes. We conclude that the physical features of the system were not proven inadequate to protect the quality of the state's waters.

IV

Moreover, we conclude that no risk to the quality of the state's waters is necessarily inherent in the situation, even if the Daniels are unable to hook up to the sewer to the south by gravity flow. The possibilities of hook-up to the north or of a permanent on-site system make the problem one involving the need for choice, not one in which the subject sewer extension itself threatens to violate the statutory standard.

V

In the instant case Ecology conditioned the approval of the sewer extension on the filing of a private easement offered to the Daniels. The agency further required the easement to allow access not later than a year from the date of sewer project completion.

Respondents did not appeal Ecology's conditions of approval and are, therefore, bound by them. An easement must be available to the Daniels. To require more, however, is to become involved in the resolution of the private dispute of the parties. Such involvement would entangle Ecology (and this Board) in an area far afield from the approval or disapproval of sewer extensions on the basis of water quality protection.

VI

The Department of Ecology is an administrative agency created by statute and without inherent or common-law powers. It may exercise only those powers expressly conferred by statute or necessarily implied therefrom. Human Rights Commission v. Cheney School District, 97 Wn.2d 118, 641 P.2d 163 (1982).

We do not doubt Ecology's implied authority to condition the approval of sewer extensions with provisions necessary to advance the statutory aim of water quality protection. See State v. Crown Zellerbach Corp., 92 Wn.2d 894, 602 P.2d 1172 (1979). Where not already compelled locally through the plat approval process, such power to condition may include authority to require appropriate

dedications to the public for sewer lines in new developments.

But, in this case appellants ask us to reform an offered private easement to make its terms more favorable to them. Under the facts here where alternate means of access or disposal exist, we perceive no necessity for Ecology to dictate the terms of the exchange of property interests between private parties.

VII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters the following

ORDER

The action of the Department of Ecology in approving the sewer extension proposed by David Rodman is affirmed.

DONE this 2nd day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Presiding

LAWRENCE J. FAULK, Member 6/2/88

JUDITH A. BENDOR, Member

LIB.

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF GEORGIA PACIFIC, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB NO. 87-82 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter is the appeal of a $10,000 civil penalty for two alleged violations of the appellant corporation's National Pollutant Discharge Elimination System (NPDES) permit during the month of November 1986.

The case came on for hearing before the Pollution Control Hearings Board, on October 19, 1987, in Seattle, Washington. Respondent Department of Ecology elected a formal hearing pursuant to RCW 43.21B.230.

Appellant Georgia Pacific Corporation appeared by its Attorney, Robert R. Davis, Jr. Respondent Department of Ecology appeared by Charles W. Lean, Assistant Attorney General. Lesley Gray of Evergreen Court Reporting recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard, exhibits examined, and contentions made, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant Georgia Pacific Corporation operates a paper, pulp and chemical complex in Bellingham, Washington. The facility discharges through a secondary (biological) treatment plant into the waters of Bellingham Bay. At all times relevant to this proceeding Georgia Pacific's discharges were regulated by an NPDES permit (Permit No. WA 000109-1), issued by the State Department of Ecology, which among other restrictions sets forth effluent limitations for biochemical oxygen demand (BOD) and total suspended solids (TSS).

II

Respondent Department of Ecology is an agency of the State of Washington with responsibility for administering state and federal water pollution control programs, including the NPDES permit program.

III

On a monthly basis, Georgia Pacific's NPDES permit limits

discharges to an average of 21,500 pounds per day of BOD and 33,600 pounds per day of TSS. Condition S1.

Permit condition G1 states:

> All discharges and activities authorized by this permit shall be consistent with the terms and conditions of this permit. The discharge of any pollutant more frequently than, or at a level in excess of, that authorized by this permit shall constitute a violation of the terms and conditions of this permit.

IV

BOD and TSS discharges from the Bellingham facility are measured by continuous monitoring equipment, the readings from which are used to derive daily 24-hour composites. Over a month's time, the average of these daily composites is computed to determine the "monthly average". The monitoring and computations are performed by Georgia Pacific, as a separate permit requirement. Condition S2. Discharge monitoring reports are made monthly to Ecology.

V

The report for November 1986 showed a "monthly average" for BOD of 24,200 pounds and for TSS of 37,400 pounds. There is no dispute that these exceedences of the permit effluent limitations occurred.

VI

RCW 90.48.144 provides for the assessment of a civil penalty on a strict liability basis for every violation of the conditions of a

waste discharge permit. The penalty incurred is "in an amount of up to ten thousand dollars a day" for each violation.

On April 27, 1987, almost five months after receiving the discharge monitoring report for November 1986, Ecology issued a Notice of Penalty Incurred and Due (No. DE 87-131), directed to Georgia Pacific, assessing a total penalty of $10,000 for exceeding the "monthly average" BOD and TSS limitations of its NPDES permit in November 1986.

From this assessment, appellant corporation appealed to this Board on May 18, 1987.

VII

The record does not disclose any corrective action taken by Georgia Pacific between the time of the violations in November 1986 and the time the penalty was issued in late April 1987.

However, by the time of our hearing in October 1987, the company had obtained new equipment which it hoped would permit it to achieve sufficient waste water reduction to solve the BOD and TSS problems.

VIII

Georgia Pacific has experienced difficulties in meeting discharge standards since the present lagoon was placed into operation in 1979.

Since July 1983, Ecology has fined the company 16 times for BOD exceedences and twice for TSS exceedences, not including the penalties at issue.

The pattern of penalties has been one of gradual escalation. Penalties in 1983 were for $250 per violation cited. In 1984 two early-year violations were assessed at $500 each and a late-year exceedence brought a $1,000 fine. In 1985, the first violation was assessed at $1,000 and the next fine resulted in penalties of $2,000 each. A final 1985 penalty was for $4,000. [1]

The penalties in the instant case - $5,000 for BOD and $5,000 for TTS - represented a further increase over past sanctions.

IX

The violations of the NPDES permit in November 1986 are not in dispute. The presentations in this case were directed to the aggregate penalty amount of $10,000. Appellants contend that the penalty is excessive in light of the efforts made to solve the problem and the circumstances surrounding the November discharges.

X

Since-mid 1983 Georgia Pacific has taken a series of remedial measures to improve the performance of its treatment system. These include the addition of more aerators and the lengthening of the path effluent must follow through the lagoon.

But, the approach known from the outset to present the surest

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[1] In Georgia Pacific's current permit, issued in June of 1985, the BOD and TSS limitations were tightened slightly to reflect revised federal guidance on what can be achieved by available technology.

solution is reduction of waste water flow into the lagoon in order to increase retention time, with resultant improvements in BOD and TSS removal. Nonetheless, the flow reduction target originally planned for mid-1980 had not been achieved by November 1986 when the violations in question occurred. At our hearing in October 1987, the corporation reported that it was on the threshold of achieving the flow reduction needed.

XI

Georgia Pacific asserted that cold weather in November 1986 caused a reduction in biological activity beyond their control, and that this factor should be considered in mitigation of the penalty.

On the record before us we are unable to determine that ambient air temperatures were the likely cause of the exceedences. There is no evidence that temperatures in the lagoon were outside the 16 to 27 degrees centigrade range for which the system was designed.

XII

In any event, we find that adequate reduction in waste water flow - a technique within the company's control - would likely solve any problems which might arise from ambient air temperatures. Influent temperature will go up with less water flow since the same amount of heat from the mill will be contained in less water.

XIII

Any Conclusions of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board come to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B RCW and 90.48 RCW.

II

As noted, RCW 90.48.144 provides for penalties of up to $10,000 per day per violation of permit conditions. Ecology asserts that where the standard violated is of a type which requires an average of daily values for a month, the per day maximum can be assessed for each day of the month. The approach of the court in Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 791 F.2d 304 (4th Cir 1986) supports such an interpretation of federal law penalty provisions.

If the Gwaltney approach were applied to the two state-law-based "monthly average" violations here, the theoretical maximum would be penalties totaling $600,000 (60 daily penalties assessed at $10,000 a piece).

III

We do not find it necessary to resolve the question of whether the Gwaltney approach is permissable under RCW 90.48.144. In the instant case, the penalty assessed was only one half of the maximum possible, if each "monthly average" exceedence were treated as a single

violation.

We note that in 1985 the legislature increased the statutory maximum from $5,000 to $10,000 per violation per day, reflecting an intent to treat actions contravening water pollution control laws with increased seriousness. Section 2, Chapter 316, Laws of 1985.

IV

The penalty statute sets forth the following in relation to the amount of penalty:

> . . . The penalty amount shall be set in consideration of the previous history of the violator and the severity of the violation's impact on the public health and/or the environment in addition to other relevant factors . . . . RCW 90.48.144.

The Board has included the likely effect of the penalty on influencing corrective behavior as among the "other relevant factors" considered in evaluating the amount assessed. Port Townsend Paper Corporation v. DOE, PCHB 86-136 (1988).

Remedial actions are relevant because the purpose of civil penalties is to deter future violations, both of the perpetrator and of the public generally. See Cosden Oil Co. v. DOE, PCHB 85-111 (1986). The most influential post-violation activities, therefore, are those occurring between the time the violations occurred and the time the penalty was assessed. Weyerhaueser Company v. DOE, PCHB Nos. 86-224 and 87-33 (1988).

V

Applying the several factors to be weighed, we are impressed by the extensive history of violations here. Given such a continuing pattern of violations, the escalation of penalties pending the resolution of the difficulty is consistent with the statutory purpose. The idea is to apply the heat until the problem is solved.

Further the lack of demonstrated public health or environmental harm does not much affect the appropriateness of penalty amounts in a NPDES permit violation case. The whole premise of the federal Clean Water Act, which the state implements through permit issuance under its own statutes, it that harm does not need to be shown. The scheme is, in general, one of strict liability for unlawful discharges. See SPIRG of New Jersey v. Georgia Pacific, 615 F. Supp. 1419 (1985). In the broad sense, harm is legislatively presumed.

Finally, we are not persuaded that the circumstances here or the remedial measures employed before issuance of this penalty are such as to call for its reduction on ground of prior satisfaction of the statute's deterrence aims.

Under all the facts and circumstances we conclude that the $10,000 penalty assessed in this case was not excessive.

IX

Any Findings of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

Department of Ecology Notice of Penalty Incurred and Due No. DE 87-131 is affirmed.

DATED this 11th day of July, 1988.

POLLUTIONS CONTROL HEARING BOARD

WICK A. DUFFORD, Chairman

JUDITH A. BENDOR, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD

IN THE MATTER OF RICK and CHERYL SKODA, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 87-83 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of compliance order DE 87-N200 relative to abandonment of a dug well, came on for formal hearing before the Board on October 8, 1987, in Seattle, Washington. Seated for and as the Board were Lawrence J. Faulk (Presiding), Wick Dufford (Chairman), and Judith A. Bendor. Bibi Carter, court reporter, officially reported the proceedings.

Appellant represented himself. Respondent agency was represented by Assistant Attorney General, Peter R. Anderson.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From the testimony, evidence and contentions of the parties, the Board makes these

FINDINGS OF FACT

I

Appellants are former owners of residential property near Lake Stevens in Snohomish County which contains an old hand dug well. The well is a six foot by six foot square hole approximately 27 to 30 feet deep with a static water level at approximately six feet below the land surface.

II

The Washington State Department of Ecology (DOE) is an environmental management and regulatory agency empowered to regulate the construction, maintenance and abandonment of water wells under authority of Chapter 18.104 RCW and Chapter 173-160 WAC.

III

In 1976 the Skodas purchased from the Muzzys the property containing the well in question. At the time of their purchase the top of the well was overlain with a concrete slab with a hole in the center covered by a removable cap. The Skodas, feeling that the arrangement was both dangerous and unaesthetic, decided to change the covering and disguise the well's existence. They broke up the concrete slab covering the well and replaced it with a covering of plywood, beauty bark and dirt. Finally a rhododendron was planted on the dirt covering.

IV

The well was never used by the appellant as a source of water for the residence. In 1986, the appellant sold the property to the Moores.

V

On April 3, 1987, the Department of Ecology received a complaint about the well. Mrs. Moore, while watering the bush planted over the makeshift cover of the well, (in the company of her six year old daughter) had broken through the dirt and fallen part way into the well. She was able to stop herself before actually being immersed in water, but was shaken by the experience. She believed that if her child had fallen into the well, she would have gone into the water, which could be fatal.

On April 6, 1987, the DOE investigated the complaint and confirmed the existence of the well, the facts regarding how it was disguised, and the hole in the plywood through which Mrs. Moore had fallen. After interviewing the Muzzys, the Skodas and the Moores the DOE issued Order No. DE 87-N200 on April 29, 1987, directing it to the Skodas. The Order found that the well is a health and safety hazard and ordered the Skodas to do the following:

> Abandon this well in accordance with procedures outlined in WAC 173-160-330, abandonment and destruction of wells (see enclosed copy) within 30 days upon receipt of this order; notify the Department of Ecology when the work is completed.

VI

Appellant received the Order on May 4, 1987, and feeling aggrieved appealed to the Board on June 8, 1987, for relief. The matter became our cause number PCHB 87-83.

VII

The Skodas do not contest the facts previously recited. Their sole defense is that, since they have sold the property, they do not believe they should be solely responsible for carrying out the proper abandonment of the well.

Mrs. Moore has agreed to provide the Skodas access to the property to comply with the Order.

VIII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and this matter. Chapters 18.104 and 43.21B.

II

Under terms of RCW 18.104.040(4) DOE was granted power to adopt rules concerning water wells, including the following:

> (b) Methods of sealing artesian wells and water wells to be abandoned or which may contaminate other water resources;

DOE exercised this rulemaking power in adopting Chapter 173-160 WAC. An abandoned well by definition is a well which has been "rendered unproductive." WAC 173-160-030(1). Wells which are abandoned must, under WAC 173-160-290, be abandoned in a manner consistent with DOE's regulations. For dug wells the abandonment requirements are set forth in WAC 173-160-330. That section provides:

> Clean chlorinated sand shall be used to fill the bottom of the well to a point 2 feet above static water level. The remainder of the well to land surface shall be filled with clay, concrete or puddled clay. Piping of cementing materials directly to the point of application or placement by means of a dump bailer or tremie is recommended. If concrete, cement grout or neat cement, when used as a sealing material below the static water level in the well, it should be placed from the bottom up by methods that shall avoid segregation or dilution of the material.

III

We conclude that the appellants' actions in covering and disguising the well were acts constituting the abandoning of the well, as that term is used in the regulations. However, these actions clearly failed to conform with the requirements for abandoning dug wells set forth by WAC 173-160-330.

IV

RCW 18.104.060 provides, in pertinent part:

> Notwithstanding and in addition to any other powers granted to the Department, whenever it appears to the director, . . . that a person is violating or is about to violate any of the provisions of this chapter, the dirctor,, . . . may cause a written regulatory order to be served upon said person . . . The order shall specify the provision of this chapter and if applicable, the rule or regulation adopted pursuant to this chapter alleged to be or about to be violated . . . and shall order the act constituting the violation . . . to cease and desist or, in appropriate cases, shall order necessary corrective action to be taken with regard to such acts within a specific and reasonable time. . . .

V

Pursuant to 18.104.060 the issuance of the regulatory order at issue was proper. A rule adopted to implement the underlying statute is being violated and the case is appropriate for requiring necessary corrective action. The 30 day time period specified is reasonable.

VI

We further conclude that appellants' actions in this case make them proper parties to whom to issue the regulatory order. It was their activity which created the health and safety hazard DOE seeks to eliminate.

Appellants argue that part of the responsibility for properly abandoning the well should also be born the current landowner.

In the exercise of prosecutorial discretion, the DOE did not choose to issue an order to the current property owner. We do not read the regulation as requiring it to do so.

VII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The regulatory order, DE 87-N200 is AFFIRMED.

DONE this 6th day of November, 1987.

POLLUTION CONTROL HEARINGS BOARD

11/6/87

LAWRENCE J. FAULK, Presiding

WICK DUFFORD, Chairman

JUDITH A. BENDOR, Member

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

EDWARD R. ESTER, dba WARD APARTMENTS, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 87-84 and 87-189 FINAL FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Edward R. Ester, d/b/a/ Ward Apartments appealed to this Board contesting the Puget Sound Air Pollution Control Agency's ("PSAPCA") issuance of Notice and Order of Civil Penalty (No. 6652). The Notice and Order alleges violations of Regulation I, Section 9.08(a) (burning waste-derived fuel) for conduct on December 12, 1986, and assessed a $1,000 fine. This became our PCHB No. 87-84.

Mr. Ester also appealed PSAPCA's issuance of Notice and Order of Civil Penalty No. 6712. That Notice and Order alleges a violation of

Regulation I, Section 9.03(b) and WAC 173-400-040(1) (opacity), for conduct on July 12, 1987, and assessed a $400 fine. This became our PCHB No. 87-189.

The appeals were consolidated for hearing which was held on December 14, 1987, and continued to January 11, 1988, and March 13, 1988. Court reporters affiliated with Gene Barker & Associates recorded the proceedings. Appellant Ester was represented by Attorney Michael L. Olver of Merrick & Olver, P.S. Respondent PSAPCA was represented by Attorney Keith D. McGoffin of McGoffin and McGoffin.

Witnesses were sworn and testified. Exhibits were admitted and examined; argument was made. The Board members have reviewed the record. From the foregoing, the Board makes these

FINDINGS OF FACT

I

Respondent Puget Sound Air Pollution Control Agency ("PSAPCA") is an activated air pollution control authority under terms of the state's Clean Air Act, Chpt. 70.94 RCW, empowered to monitor and enforce regulations on burning waste-derived fuel and on opacity in a five-county area of mid-Puget Sound.

The agency has filed with the Board a certified copy of its Regulation I, including all amendments thereto. We take judicial notice of Regulation I (as amended).

II

At all times relevant to these appeals, Appellant Edward R. Ester

owned an apartment building known as the Ward Apartments, located at 105 Ward Street in Seattle, Washington, King County.

III

On December 3, 1986 PSAPCA received a complaint addressed to the U.S. Environmental Protection Agency which alleged, inter alia, that the owner/landlord of the Ward Apartments burned "dirty 'used' oil". Based on that complaint, PSAPCA's engineer sent a letter by certified mail on December 4, 1986 to Mr. Edward Ester informing him that a complaint had been received, and stating that PSAPCA proposed to inspect Ward Apartments, pursuant to RCW 70.94.200 and Regulation I, Section 3.05(a), on December 12, 1986 at 9:00 a.m. to collect samples. The letter further stated that if the date and time were not convenient, the Agency should be contacted to arrange a "mutually acceptable date and time". (R-4) A second letter dated December 9, 1986 was sent by certified mail to Mr. Ester reciting that a telephone conversation had been held with him, and confirming the (above) inspection schedule.

IV

PSAPCA's engineer who worked on this case has been employed by the agency for nine years and is a licensed engineer in the State of Washington. He has a Bachelor's degree in physics, and has taken numerous air pollution courses including ones on sampling and field enforcement. He has also assisted in developing Regulation I, Section 9.08, which forms the basis of the alleged violation in PCHB No. 87-84.

V

On December 12, 1986, the engineer arrived at the Ward Apartments and identified himself to the apartment manager. The engineer went to the oil tanks. These underground tanks feed into the Apartment's furnace.

Prior to sampling, the engineer measured the depth of oil in the tanks. The oil samples were then taken primarily above the bottom sludge level. A glass tube was inserted three times into each tank and a total 150 milliliters of oil per tank were placed into clean sample containers. The containers were labeled and a chain of custody prepared.

VI

The samples were split with one set sent to the E.P.A. laboratory in Manchester. PSAPCA also performed tests on the samples in its own laboratory. Regulation I, Section 9.08(c) defines "waste-derived fuel" as fuel exceeding specified limits. The laboratory test summary results showed the following results, with the Regulation I limits shown in the last column:

RESULTS	WARD APARTMENT TANKS			Regulation I
PSAPCA tests	A	B	C	Limits
Sulfur (%)	.13	.01	.33	2.00%
Chlorine (ppm)	3900	5034	2851	1000 ppm
(EPA) tests				
Arsenic (ppm)	0.4	4.6	1.4	5 ppm
Cadmium (ppm)	3.9	3.5	3.3	2 ppm
Chromium (ppm)	7.3	28.4	8.7	10 ppm
Lead (ppm)	256	536	237	100 ppm
PCB (ppm)	2	2	2	5 ppm

VII

On the basis of the inspection Notice of Violation (No. 0022426) dated December 12, 1986 was issued. After the laboratory results were received in April 1987, Notice and Order of Civil Penalty (No. 6652) was issued assessing a $1,000 fine, from which this appeal (PCHB No. 87-84) was filed.

VIII

We find that oil in the tanks more probably than not exceeded Regulation I, Section 9.08(e) limits for four different chemicals: chlorine, cadmium, chromium and lead. In some instances the levels were more than 5 times the regulatory limits (i.e. Tank B for chlorine and lead). We find that PSAPCA did not authorize the burning of such oil.

IX

Appellant's expert's critique of PSAPCA's sampling was unpersuasive. The expert was neither on-site during the sampling, nor had he been on site and inspected the tanks at any time prior to testifying. His main point was that he believed the samples were not representative of material burned in the furnace. However, some critical information he relied upon, such as the supposed location of the feeder pipe in the tanks, was based on assumptions of fact not in evidence. In sum, we are persuaded that PSAPCA's sampling was proper.

From the season of the year and the physical relationship of the tanks to the furnace, we infer that fuel from the tanks had been

burned in the furnace. Although the oil sampled may have contained some sludge, there is no reliable evidence that such oil-containing sludge was not burned. We further infer, therefore, that the samples properly represented oil that was burned. Such an inference is proper, when the tested material is located in such an area solely under appellant's control. Appellant provided no direct evidence whatsoever to rebut such inference; the only scintilla of evidence presented was dependent upon second-hand information which we were not convinced was reliable.

X

On July 13, 1987, in response to a citizen's complaint received about 2:00 p.m., a PSAPCA air pollution inspector arrived at the Ward Apartment at approximately 2:15 p.m. The inspector is trained in detecting plume opacity, having been certified by the Department of Ecology as a plume reader 34 times in the past 15 years. His most recent certification relevant to this incident was on October 3, 1986, valid for one year for black smoke and six months for white smoke.

The inspector positioned himself 150 feet westerly of the Apartments, and beginning at 2:20 p.m. for six consecutive minutes at 15 second intervals read and recorded the smoke coming out of the Apartment's chimney. The readings showed 30% to 40% opacity with the color black.

XII

As a result of the July 13, 1987 inspection, PSAPCA sent appellant Notice of Violation (No. 002304), and thereafter Notice and Order of Civil Penalty (No. 6712) assessing a $400 fine. Appellant appealed to this Board on August 10, 1987, and the appeal became our PCHB No. 87-189.

XIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the person and the subject matter of this proceeding. RCW 43.21B.110.

Respondent PSAPCA has the burden of proof in these appeals.

II

Section 9.08(a) prohibits burning waste-derived fuel without prior approval of PSAPCA.

"Waste derived fuel" is defined as:

> [. . .] any fuel that is contaminated with dangerous waste or exceeds, in the case of fuels in a liquid state under standard conditions, <u>any of the following limits</u>:
> (i) 0.10 percent ash by weight
> (ii) 100 parts per million (ppm) by weight of lead;
> (iii) 5 ppm arsenic by weight;
> (iv) 2 ppm cadmium by weight;
> (v) 100 ppm chromium by weight;
> (vi) 1000 ppm by weight chlorides;
> (vii) 5 ppm polychlorinated bephenyls (PCB's);
> [. . .]

Regulation I, Section 9.08(e)(1); emphasis added.

We conclude that respondent PSAPCA did prove that a violation of Regulation I, Section 9.08(a) occurred on December 12, 1986.

III

Regulation I, Section 9.03(b) prohibits a person from causing or allowing air emissions darker than 20% density more than 3 minutes in any one hour. Emissions of 30% or greater were seen on July 13, 1987, for 6 out of 6 minutes. WAC 173-400-040(1) prohibits the same, subject to some exceptions not litigated herein. We conclude that a violation of Regulation I, Section 9.03(b) and WAC 173-400-040(1) occurred. As the owner of the apartment, Mr. Ester is liable for emissions from his building.

IV

RCW 70.94.200 authorizes air pollution inspectors to enter on private property for investigation purposes. PSAPCA's Regulation I, Section 3.05 is based on the statute. PSAPCA's December 12, 1987 inspection was announced and known by appellant in advance. It was conducted at a reasonable time and fully complied with the requirements of RCW 70.94.200 and Regulation I, Section 3.05. (It can be observed that PSAPCA's prior announcement of its inspection, one week ahead, had the potential to jeopardize PSAPCA's ability to ultimately sample the tanks without intervening interference with the tanks' contents.) Appellant's non-constitutional claims about the impropriety of the inspection are without merit.

Appellant's claims that the oil tank inspections were unconstitutional are legal issues that this Board does not have the jurisdiction to address. Yakima County Clean Air Authority v. Glascam Builders, 85 Wn.2d 255, 534 P.2d (1975); Bud Vos v. DOE, PCHB No. 86-149, (May 8, 1987).

V

The purpose of civil penalties is to promote compliance with the laws. The violations found herein are significant ones. Under all the facts and circumstances, we are persuaded that the penalties assessed here were appropriate to further the statutory objective.

VI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

Notices and Orders of Civil Penalty Nos. 6652 and 6712 issued by PSAPCA to Edward R. Ester, dba Ward Apartments, are AFFIRMED in full, for $1,000 and $400 respectively.

SO ORDERED this 22nd day of September, 1988.

POLLUTION CONTROL HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Presiding

Wick Dufford
WICK DUFFORD, Chairman